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JUST EDUCATION: AN ESSAY FOR FRANK MICHELMAN

Martha Minow*

One of the many reasons why there is no legal scholar I admire more than Frank Michelman lies in his own personal commitment to learning. Frank learns all the time. He teaches himself new things; he stretches and challenges his old ideas. He tries new ones. Receptive to new theoretical developments, he has not only welcomed Rawlsian theories of justice, critical legal studies, feminism, republicanism, critical race theory, law and economics, and Habermasian conceptions of liberalism, but he has also notoriously improved other people's theories in both his sympathetic and critical retellings.

In the context of evaluating whether economic analysis offers a basis for preferring private property arrangements, Frank concluded one article with a statement that exemplifies what makes his work so commendable. He wrote: "With that provisional view, you might want to keep on investigating, rather than considering the matter closed."¹ There could be no better exemplar of the commitment to learning and thinking, and to education of self and others.

Of course, Frank's commitment to education takes more concrete expressions. His career as an invigorating and inspiring classroom teacher is matched only by his unparalleled gifts as a mentor and interlocutor for law students, graduate students, and colleagues. With our offices close by, I get to eavesdrop occasionally on the animated one-on-one sessions Frank holds as he discusses canonical texts, new drafts, and unwritten ideas with students and colleagues.

Further, Frank has repeatedly brought his laser-sharp focus on the case for a right to education, the focus of my essay. Education figures prominently in his bold 1969 argument that the Fourteenth Amendment's commitment to equal protection of the laws involves a duty to protect the poor.² There he demonstrated that the distinction between the evils of relative and absolute

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1. Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in *NOMOS XXIV: Ethics, Economics, and the Law* 3, 34 (J. Roland Pennock & John W. Chapman eds., N.Y.U. Press 1982) (reprinted in 39 *Tulsa L. Rev.* 663 (2004)).

2. See Frank I. Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 *Harv. L. Rev.* 7 (1969).

deprivation has no bearing on the question of objective inequality.³ Indeed, he showed eerie prescience in considering the deprivations that would be worked by users' fees in schools,⁴ as many jurisdictions now struggle with whether to prevent families from supplementing school vouchers. Frank evidenced similar foresight in highlighting the role the state action doctrine plays in insulating inequality from challenge,⁵ for currently members of wealthy communities create private foundations to fund their own local public school without benefiting schools in other neighborhoods.

Frank argued in 1979 that basic education and "the literacy, fluency, and elementary understanding of politics and markets that are hard to obtain without it . . . [are] universal, rock-bottom prerequisites of effective participation in Democratic representation"⁶ In 1988, he offered a bracing interpretation of *Brown v. Board of Education*⁷ that in many ways prefigures later Michelmanian conceptions of the relationships among law, democracy, and politics:

If we imagine the *Brown* Court acting in accordance with the understanding . . . of constitutional adjudication as always proceeding from within an on-going normative dialogic practice, then that Court's willingness to be [enlisted in the transformative politics of the civil rights movement] must signify its grasp of the enlists and their work as lying within the bounds, if away from the center, of our then constitutional practice. Thus informed, the *Brown* Court spoke in the accents of invention, not of convention; it spoke for the future, criticizing the past; it spoke for law, creating authority; it engaged in political argument.⁸

It should be clear that we could follow Michelman's contributions to the jurisprudence of education into many fascinating fields and forests. What conceptions of equality and protection and what moral theories best serve a liberal democracy proceeding under non-ideal conditions?⁹ When and how can social and economic rights be justiciable and enforceable by courts, a matter of great moment in contemporary South Africa, if not obviously so in the United States?¹⁰ What relationship should law have to politics? What could ground the right to have rights or the right to inclusion that itself would inform the shape of all rights?¹¹ What kind of social life as well as political procedures are essential to liberal constitutional democracy?¹² How does the state's treatment of extra-

3. *Id.* at 49.

4. *Id.* at 46.

5. *Id.* at 55-57.

6. Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 Wash. U. L.Q. 659, 677. That the text put the argument in the form of rhetorical questions manifests the emphasis the author used to articulate it.

7. 347 U.S. 483 (1954) ("*Brown I*").

8. Frank Michelman, *Law's Republic*, 97 Yale L.J. 1493, 1524 (1988).

9. See Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 Intl. J. Const. L. 13 (2003); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. Pa. L. Rev. 962, 1015-19 (1973).

10. See generally Michelman, *supra* n. 8, at 1524.

11. See Frank I. Michelman, *Parsing "A Right to Have Rights,"* 3 Constellations 200, 205 (1996).

12. See Frank I. Michelman, *What (if Anything) is Progressive-Liberal Democratic Constitutionalism?*, 4 Widener L. Symp. J. 181, 194-95 (1999).

governmental social processes—social movements and protest actions—affect the prospects for transformative self-renewal needed by a liberal constitutional democracy but feared by state officials?¹³ How can we mediate the “empire and *paideia*”¹⁴ to promote and enlarge freedom through self-government?¹⁵ Frank himself has planted and continues to harvest these fields more brilliantly than anyone else could. Therefore, I will pursue the jurisprudence of education in a different, though I hope, compatible, mode.

I want to revisit the historic struggle to end racial segregation and subordination in American schools. This period includes the present, for the struggle is far from over. Legal strategies of the National Association for the Advancement of Colored People (NAACP), the civil rights movement, and the chain of judicial opinions stretching from the 1930s through the present, with special focus on the 1950s and 1960s, are the focus of my article. The questions I want to ask are of historical explanation and contemporary theory. How did it come to pass—and what should it mean for the development of a cogent theory of rights—that the anti-communism of the cold war era could be mobilized to chill and punish advocates for racial equality and social justice, while the same anti-communism could infuse governmental support for desegregating the military, schools, and political life? Drawing from recent historical work,¹⁶ I will suggest that the political dynamics of the 1940s and 1950s pushed for disaggregating the vision of an equal and free people into separate dimensions: the civil, the political, the economic, and the social. As Mark Tushnet has argued, drafters and contemporaneous interpreters of the Reconstruction Amendments similarly categorized rights along these lines, but the content within each category has changed significantly over time.¹⁷ If any context invited an integration of civil,

13. See Michelman, *supra* n. 8, at 1531-32.

14. Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4, 73 (1986).

15. See *id.* at 73-74.

16. Carol Anderson, *Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-1955* (Cambridge U. Press 2003); Taylor Branch, *Parting the Waters: America in the King Years 1954-63* (Touchstone 1988); Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton U. Press 2000) [hereinafter Dudziak, *Cold War*]; Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* (Oxford U. Press 1994); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 Stan. L. Rev. 61 (1988) [hereinafter Dudziak, *Desegregation*].

17. See Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, in *The Constitution and American Life* 224, 226-27 (David Thelen ed., Cornell U. Press 1988); Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 Loy. L.A. L. Rev. 1207, 1209-10 (1992) [hereinafter Tushnet, *The Future*]. Tushnet argued that “[f]or Reconstruction legal thinkers civil, political and social rights were seen as three distinct categories.” Tushnet, *The Future*, *supra* n. 17, at 1208. He explains his views about the categories:

Civil rights attached to people simply because they were people; they were the rights one had in a state of nature, such as the right to personal freedom of action, the right to life and the right to select and pursue a life plan. The Privileges or Immunities Clause of the Fourteenth Amendment protected these civil rights. Political rights, in contrast, arose from a person's location in an organized political system. These included the right to vote and otherwise participate in the political life of the community by, for example, jury service. The Fifteenth Amendment protected the central political right to vote. Social rights were exercised in the rest of the social order and, most importantly, in the market. For

political, economic, and social rights, it would be education, where each student should not only be seen as a child like any other child, but also as a potential voter, juror, employer, taxpayer, and friend or neighbor.

Therefore, in the cases leading up to *Brown v. Board of Education*, the plaintiffs and their lawyers tried to integrate these different facets into their arguments for desegregating the schools.¹⁸ As the remedial process unfolded in a context of resistance and conflict, courts increasingly disaggregated the rights and the vision was lost. The recent legal struggle under state constitutions for adequate education offers a chance to reassemble these vital elements, but only if enriched and enlivened by the kind of ambitious, generous, self-critical, and dialogic project of political and social theory and practice exemplified by the work of Frank Michelman.

I. THE PROBLEMATIC

Legal historians Mary Dudziak, Michael Krenn, and Thomas Borstelmann have thoroughly documented the influence of cold war politics on the federal government's decision to desegregate the military and advocate desegregating schools.¹⁹ Rhetoric about American freedom and democracy increased during World War II. America's image and its claims to epitomize democracy received serious challenges, however, when international media and foreign governments, after the war, criticized Jim Crow laws and other racist policies in the United States.²⁰ In the midst of America's fight against Communism in the cold war, this challenge to American claims genuinely impaired U.S. international efforts, especially in the developing world. Hence, people in the State Department and other officials pressed for improving domestic treatment of racial issues as part of a foreign policy strategy.²¹ President Truman pursued pro-civil rights propaganda and speeches. This important feature of federal policy may indicate the limitations in the government's commitment to civil rights.²² The federal government's support of racial segregation reflected foreign policy and political

Reconstruction legal thought, government had nothing to do with guaranteeing social rights except to enforce those rights guaranteed by the common law.

Id. (footnotes omitted). Tushnet suggests a parallel between these categories and conceptions prevailing in the 1970s and 1980s, making distinctions among civil, political, and social rights. *Id.* at 1207. Yet the content signified by each term has changed dramatically—which, according to Tushnet, demonstrates the historically contingent nature of distinctions between types of rights. Thus, contemporary legal culture “treats the right to vote and the right of unimpeded access to public accommodations as civil rights, not as the political or social rights [beyond the scope of the Fourteenth Amendment] they would have been treated as a century ago.” *Id.* (footnote omitted).

18. See Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (Alfred A. Knopf 1976).

19. See Thomas Borstelmann, *The Cold War and the Color Line: American Race Relations in the Global Arena* (Harv. U. Press 2001); Dudziak, *Cold War*, *supra* n. 16; Michael L. Krenn, *Black Diplomacy: African Americans and the State Department, 1945-1969* (M.E. Sharpe 1999); Dudziak, *Desegregation*, *supra* n. 16.

20. See Dudziak, *Cold War*, *supra* n. 16, at 14-17; Dudziak, *Desegregation*, *supra* n. 16, at 80-93.

21. See Dudziak, *Desegregation*, *supra* n. 16, at 118; Krenn, *supra* n. 19, at 28.

22. Dudziak, *Desegregation*, *supra* n. 16, at 119.

party interests. This evidence offers some support for Derrick Bell's argument that racial justice proceeds only when the interests of blacks converge with the interests of whites.²³ Yet this narrative also raises a genuine puzzle about the operation of cold war and anti-communist ideologies in and around the struggles for civil rights. For as powerful as these ideologies may have been in mobilizing white Democratic support for civil rights, they also fueled the McCarthy-era witch hunts that stymied civil rights efforts and punished civil rights activists throughout the 1940s and 1950s.

For example, when Anne Braden, a southern white woman, advocated an end to racial segregation as a young journalist in Alabama and Kentucky in the 1940s, she became concerned about racism and poverty. Soon she was branded a leftist, a subversive, and even a Communist, and she encountered the growing gulf between liberals and left-wingers following the end of World War II. Anti-Communist rhetoric escalated in response to civil rights and labor organizing efforts after the war ended.²⁴ Referring to someone as a Communist was enough to silence many white southerners;²⁵ and known Communists faced social ostracism, long-term unemployment, and even serious violence.

Nonetheless, Braden continued her work with left-leaning civil rights groups. She and her husband Carl acted as "fronts" to buy a house for Andrew Wade IV, an African-American, in an all-white neighborhood. A leading newspaper condemned the Bradens as agitators who artificially forced the race relations issue, even though the very same paper, on the same day, endorsed the Supreme Court's ruling in *Brown v. Board of Education*.²⁶ The Wades were terrorized in their home and ultimately driven out by dynamite.²⁷ The NAACP held the matter at a distance, apparently trying to avoid links with known leftists.²⁸

The Bradens became targets of an intimidating campaign by state and federal prosecutors. Called before a grand jury investigating the violence, Anne Braden was asked about her and her husband's political beliefs and memberships. Knowing about the work of the House UnAmerican Activities Committee, she refused to answer. The prosecutor and local media drummed up hints of Communist solicitation of violence. The grand jury concluded that the Bradens had tried to obstruct justice because of their failure to answer questions about their political associations.²⁹

Before the end of 1954, Carl Braden and an associate were charged with and convicted of sedition. This experience actually propelled Anne's continuing and deepening involvement in civil rights activism. From that time to the present, she

23. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980); Dudziak, *Desegregation*, *supra* n. 16, at 119.

24. See Catherine Fosl, *Subversive Southerner: Ann Braden and the Struggle for Racial Justice in the Cold War South* 75, 97 (Palgrave MacMillan 2002).

25. See *id.* at 97.

26. *Id.* at 146.

27. *Id.* at 152-53.

28. *Id.* at 154.

29. See Fosl, *supra* n. 24, at 164.

has refused to respond to questions about whether she is or was a Communist, even as reporters, politicians, employers, students, and neighbors persistently inquired.³⁰

Braden's biographer treated the two different effects of cold war ideology on civil rights advocacy as ironic:

The dynamics of the Cold War thus gave government image-makers some impetus to achieve better race relations insofar as to do otherwise left the United States open to international criticism that undercut its image as leader of the free world. But ironically, those same Cold War dynamics also tended to reinforce attitudes about alleged "subversion" that had been prominent in American culture since World War II.³¹

How many individuals were deterred because they were fearful of allegations of subversion if they supported civil rights? The problem was especially complicated because for some time the Communist Party was more explicitly and emphatically committed to racial justice than the dominant political parties and even the Socialists.³² That is why Bayard Rustin initially joined the Young Communist League. He left in 1941, however, when the Nazis invaded the Soviet Union, and he assiduously sought to separate himself from Communist organizations thereafter.³³ Nonetheless, that association³⁴ followed Rustin and fed opposition when Rustin traveled to advise Dr. Martin Luther King, Jr., and later organized the March on Washington.³⁵ The FBI justified its monitoring of Rustin and King on grounds of Communist associations.³⁶

Perhaps we could understand the conjunction of cold war and anti-Communist policies as efforts to placate southern Democrats. President Truman's administration could appeal to their anti-Communism by indicating the need for some concessions on race relations while holding the line against rights to housing or health care that smacked of Soviet subversion of democracy and free markets.³⁷ Even Eleanor Roosevelt, ostensibly a great friend to the civil rights movement, performed this political dance in her role as chair of the UN Commission on Human Rights. In the early 1950s, with full awareness of the potential links to Jim Crow in the United States, she joined southern leaders in trying to halt a complaint to the UN arising from South Africa's systematic race discrimination.³⁸ She also supported the inclusion of a clause in the Covenant on Human Rights that would insulate states within a federal system from interference though she

30. See *id.* at 212-68, 307-31, 334.

31. *Id.* at 289.

32. Jervis Anderson, *Bayard Rustin: Troubles I've Seen: A Biography* 55 (U. Cal. Press 1998).

33. *Id.* at 56, 205.

34. Rustin, who was sexually involved with men, also was dogged by rumors and negative reactions to his sexuality. See John D'Emilio, *Homophobia and the Trajectory of Postwar American Radicalism: The Career of Bayard Rustin*, 62 *Radical Hist. Rev.* 80 (1995).

35. Anderson, *supra* n. 32, at 210, 247, 267.

36. *Id.* at 202-04, 267. J. Edgar Hoover apparently pursued restraints on King even without evidence at the height of national fear of Soviet aggression. Branch, *supra* n. 16, at 678-79.

37. See Anderson, *supra* n. 16, at 5.

38. See *id.*

knew this would leave unchallenged the lynching and racialized justice of the American South.³⁹ Indeed, her statement on the subject included an assurance that the federal government would not insist on a “right to education”⁴⁰ because of the clause protecting states within a federal system. It is hard not to conclude, as historian Carol Anderson has stated recently, that Roosevelt “saw to it that the human rights documents emerging from her committee would position the United States as the moral leader of the free world, while the United States continued its amoral treatment of African Americans.”⁴¹

Pressured to demonstrate its anti-communism, and facing vigilant review by the FBI, the NAACP undertook an internal witch hunt and purged not only actual but also suspected Communists.⁴² Some found the NAACP more concerned with its anti-Communism than civil rights.⁴³ When the federal government indicted (but unsuccessfully prosecuted) W.E.B. Du Bois for failing to register as a foreign agent while participating in the creation of the Peace Information Center—a New York effort to distribute information about world peace conventions—the NAACP leadership distanced itself from Du Bois, the organization’s co-founder. Motivated in part by a personal rivalry with Du Bois, Walter White warned that the patriotism of the NAACP would come under question if it supported Du Bois and his allegedly Communist-inspired propaganda.⁴⁴

One organization that had deep Communist ties, the National Negro Congress,⁴⁵ developed the idea of petitioning the United Nations over the human rights violations embedded in the treatment of African-Americans in the United States. Yet, its Communist affiliations contributed to the demise of the organization—even as Communist Party leaders blamed the lack of their direct involvement in the organization for its failure.⁴⁶ NAACP leaders debated whether to adopt the idea and concluded that it would have a better chance of success because of its vigilance against Communist infiltration inside the organization.⁴⁷ Yet, to many in the United States, the United Nations itself seemed a Communist organization that challenged American sovereignty with internationalist plans for political, civil, and economic rights that the Soviets would dictate.⁴⁸ Even the convention condemning genocide seemed a Communist plot.⁴⁹ Continuing well

39. *Id.* at 4. Roosevelt regretted that sometimes she had to “disappoint old friends” at the National Association for the Advancement of Colored People but nonetheless understood her role as a representative of the U.S. government to halt taking sides on issues that divided the country. See Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* 82 (Random House 2001). Roosevelt also publicly acknowledged racial discrimination and lynchings but condemned them as both against the law and unacceptable. See *id.* at 150, 202.

40. See Anderson, *supra* n. 16, at 4.

41. *Id.* at 133.

42. *Id.* at 167.

43. *Id.*

44. *Id.* at 173.

45. Anderson, *supra* n. 16 at 20.

46. See *id.* at 90-91.

47. *Id.* at 93.

48. See *id.* at 217.

49. *Id.*

into the 1980s, advocates of the U.S. endorsement of the Genocide Convention had to contend with charges of Communism. Yet these same advocates would reply that nonratification hurt U.S. cold war diplomacy.⁵⁰ Both sides would claim to be anti-Communist, while in the meantime, such arguments narrowed the space for any rights in the United States that seemed to involve economic redistribution or social equality.⁵¹

II. THE DISAGGREGATION

In addition to the domestic and geopolitical considerations, anti-Communist and cold war conceptions contributed to and reflected the ongoing debate over which rights could and should be pursued in search of racial justice in America. That debate cannot be separated from the struggle for racial equality. White abolitionists maintained reservations over social equality and integration.⁵² Northern Republicans in 1966 specifically resisted articulations of social rights, such as interracial marriage and school integration, in addition to opposing voting and jury service.⁵³

The Supreme Court erected an explicit distinction between political rights and social rights in *Plessy v. Ferguson*.⁵⁴ In *Plessy*, Justice Brown sought to distinguish the civil right to serve on a jury announced in *Strauder v. West Virginia*⁵⁵ from the equality involved in the sharing of railroad cars. Justice Brown reasoned that the Fourteenth Amendment “could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.”⁵⁶

Organized to combat precisely that legacy, the NAACP nonetheless struggled over whether its mandate included economic as well as political and civil rights. In 1939, black political scientist Ralph Bunche criticized the NAACP’s emphasis on civil rights and neglect of economic rights.⁵⁷ This triggered a debate within the organization that to no small degree continues to this day.⁵⁸

Informed in part by global articulations of rights in the context of both international and emerging nationalist initiatives, African-American leaders ranging from William Hastie to W.E.B. Du Bois looked to emerging conceptions

50. Samantha Power, “A Problem From Hell”: *America and the Age of Genocide* 157-58 (Basic Bks. 2002).

51. See Anderson, *supra* n. 16, at 222.

52. See Benjamin Quarles, *Black Abolitionists* 47-50 (Oxford U. Press 1969).

53. Michael J. Klarman, *The Plessy Era*, in 1998: *The Supreme Court Review* 303, 325 (Dennis J. Hutchinson, David A. Strauss & Geoffrey R. Stone eds., U. Chi. Press 1999).

54. 163 U.S. 537 (1896); see Nan D. Hunter, *Escaping the Expression-Equality Conundrum: Toward Anti-Orthodoxy and Inclusion*, 61 Ohio St. L.J. 1671, 1697 (2000).

55. 100 U.S. 303 (1879) (overturning a state murder conviction of a black man given a state statute preventing blacks from serving on juries).

56. *Plessy*, 163 U.S. at 544.

57. Anderson, *supra* n. 16, at 18.

58. See e.g. Bell, *supra* n. 23, at 524-28.

of human rights to frame the vision of justice in the United States.⁵⁹ Thus, in 1944, Hastie argued, “We cannot hope to raise the literacy of other nations and fail to roll back the ignorance that clouds many communities in many sectors of our own nation . . . all people [must] have the opportunity for the fullest education.”⁶⁰ At the same time, the National Negro Congress and the NAACP petitioned the United Nations with arguments that the United States deprived African-Americans of rights enjoyed by other citizens through lynching, disenfranchisement, and staggering poverty.⁶¹ Should social and economic rights belong within basic international documents such as the Declaration and Covenants on Human Rights? Should U.N. bodies like the Human Rights Commission have authority over such issues? These issues produced contentious debates in an international context, expressing national and ideological differences,⁶² even as it continued to divide people within the United States and within the NAACP.⁶³

Comparisons of national constitutions indicate that the focus on political and civil rights in the United States contrasts with commitments to social and economic rights in other national settings.⁶⁴ Those social and economic rights may be defined and limited by statute or otherwise negotiated through political processes⁶⁵—a subject Frank Michelman has richly explored both in the United States and South African contexts.⁶⁶ William Forbath has examined in depth the strand of social and economic rights within American law and politics.⁶⁷ Central roots lie in anti-slavery and Reconstruction theories and politics. Progressive-era reformers advanced respect for wage earners that would undergird social and economic protections. President Franklin Roosevelt’s conception of the four freedoms and elements of the New Deal advanced a conception of the social and economic predicates for citizenship. The War on Poverty revived some of these ideas. Labor movements during the last two centuries also revived these ideas while articulating a conception of work as the foundational basis for equal

59. See Anderson, *supra* n. 16, at 26, 33.

60. *Id.* at 26 (quoting untitled document by William H. Hastie) (internal quotations omitted).

61. *Id.* at 80-82.

62. See Mary Ann Glendon, *Propter Honoris Respectum: Knowing the Universal Declaration of Human Rights*, 73 Notre Dame L. Rev. 1153, 1153-54 (1998); Amy C. Harfeld, Student Author, *Oh Righteous Delinquent One: The United States’ International Human Rights Double Standard—Explanation, Example, and Avenues for Change*, 4 N.Y.C. L. Rev. 59, 76-77 (2001).

63. See Anderson, *supra* n. 16, at 134-37, 142-52.

64. See W. Kent Davis, *Answering Justice Ginsburg’s Charge That the Constitution is “Skimpy” in Comparison to Our International Neighbors: A Comparison of Fundamental Rights in American and Foreign Law*, 39 S. Tex. L. Rev. 951, 966, 970 (1998); Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. Chi. L. Rev. 519, 521 (1992); Berta Esperanza Hernandez-Truyol & Shelbi D. Day, *Property, Wealth, Inequality and Human Rights: A Formula for Reform*, 34 Ind. L. Rev. 1213 (2001).

65. See Glendon, *supra* n. 64, at 524-25.

66. See e.g. Michelman, *supra* n. 6.

67. See e.g. William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 Fordham L. Rev. 1821 (2001); William E. Forbath, *The New Deal Constitution in Exile*, 51 Duke L.J. 165 (2001) [hereinafter Forbath, *New Deal Constitution*].

citizenship.⁶⁸ Academics have debated the issue both as a matter of constitutional law and as a matter of legal and political theory.⁶⁹ Whether framed in terms of debates over negative versus positive rights, justifiability, or the foundations for rights, academics have mirrored the political debate concerning whether governments should assure individuals not only protections against incursions on their liberty and rights to participate in political processes, but also social equality and economic well-being.⁷⁰ For Michelman, the issue is one of the bases of self-respect and mutual respect.⁷¹

With self-respect, mutual respect, and respect over time very much at stake, perhaps no issue so joins political and civil rights with social and economic rights so clearly as does education. The struggle for school desegregation, from its inception, implicated access to effective political participation, membership in dominant civil institutions, social integration, redressing existing economic disparities, reallocating economic resources, and opening up economic opportunities. *Brown v. Board of Education* and many subsequent cases also explicitly challenged the idea that segregated institutions could ever be economically, politically, or socially equal. Yet, the saga of school desegregation has not been a happy one. Public schools in America remain dramatically segregated by race, with patterns of growing resegregation, although the immediate cause now is housing segregation rather than racialized school assignments.⁷² Reluctance to enforce their own decision led the Supreme Court to direct a remedy with “all deliberate speed,”⁷³ a directive that surely contributed to the total inaction in most of the South for the first ten years following *Brown*. Next came the period of serious judicial supervision, along with serious and sometimes violent local opposition. It was not long, however, before the courts

68. See Forbath, *New Deal Constitution*, *supra* n. 67, at 184-85; For an argument that work—meaning an opportunity “for work to earn a living wage for all who need and demand it”—is central to citizenship, see Judith N. Shklar, *American Citizenship: The Quest for Inclusion* 99 (Harv. U. Press 1991).

69. See e.g. Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 Wash. U. L.Q. 695.

70. See Hannah Arendt, *Reflections on Little Rock*, 6 Dissent 45 (1959); Susan Bandes, *The Negative Constitution: A Critique*, 88 Mich. L. Rev. 2271 (1990); Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. Rev. 857 (2001); Marie A. Failinger, *Equality Versus the Right to Choose Associates: A Critique of Hannah Arendt's View of the Supreme Court's Dilemma*, 49 U. Pitt. L. Rev. 143 (1987); William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 Stan. L. Rev. 1771 (1994); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131 (1999); Cass Sunstein, *Against Positive Rights*, 2 E. European Constl. Rev. 35 (Winter 1993).

71. See Michelman, *supra* n. 6, at 680-81.

72. See Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* <<http://www.civilrightsproject.harvard.edu/research/reseg03/finalexec.pdf>> (Jan. 2003); Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation* <http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf> (July 2001). For thoughtful arguments favoring policies that would promote racial and economic integration in housing and schooling, see Owen Fiss, *A Way Out: America's Ghettos and the Legacy of Racism* (Joshua Cohen et al. eds., Princeton U. Press 2003); Richard Thompson Ford, *Brown's Ghost*, 117 Harv. L. Rev. 1305 (2004); Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 Harv. L. Rev. 1334 (2004).

73. *Brown v. Bd. Educ. of Topeka*, 349 U.S. 294, 301 (1955) (“*Brown II*”).

began to disaggregate social integration from other features of the desegregation effort. “White flight” and the Court’s decision to reject an interdistrict remedy assisted this development. In 1974, the Court in *Milliken v. Bradley*⁷⁴ excluded the Detroit suburbs from the effort to desegregate the Detroit schools on the grounds that the surrounding districts had not used law to produce their racial segregation and thus should not be liable for remedial action. Yet the Court later approved the district court’s call for training programs and state aid to the Detroit schools; money and in-kind services but not suburban white children could be part of the remedy.⁷⁵ In a way, economic rights, at least in terms of expenditures, became more palatable in the school context than social rights in the sense of racial integration.

Yet all of this occurred against the backdrop of the Supreme Court’s 1973 refusal to recognize wealth discrimination as an invidious discrimination in violation of the Equal Protection Clause.⁷⁶ Disparities in resources—and in educational performance—continue to characterize impoverished urban districts and indeed, entire state systems. What precisely can the Constitution, a document envisioning equal protection and democratic self-governance, ensure when it comes to education of children in a nation riddled with the legacies of racial and class hierarchies? Given the difficulties with federal court decisions, advocates and scholars increasingly ask this question outside the context of the United States Constitution. Litigators turn to state constitutions and press to close the per-pupil disparities in expenditures, or promote equal yield for districts willing to tax themselves to fund schools at an equal rate even if the tax bases are disparate.⁷⁷

The focus on economic rights in the school context had its own disappointments, however. Chief among them were the continuing and gross disparities in student performance, with high racial and class correlations. The newest wave of practical initiatives toward a right to an education engaged state courts construing state constitutions in dialogue with legislative action. For the past fifteen years, the watchword has been adequacy: what does it take to ensure an adequate education for all students?⁷⁸ Reviewing the history of struggles to define and implement a right to adequate education invites reconsideration of the divisions among political, civil, social, and economic rights.

74. 418 U.S. 717, 752-53 (1974) (“*Milliken I*”).

75. *Milliken v. Bradley*, 433 U.S. 267, 273-75, 291 (1977) (“*Milliken II*”).

76. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54-55 (1973).

77. E.g. *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Abbot v. Burke*, 575 A.2d 359 (N.J. 1990); *Seattle Sch. Dist. No. 1 v. St.*, 585 P.2d 71 (Wash. 1978). A thoughtful recent treatment of the issues that raised challenges to school finance in New York State appears in Brian J. Nickerson and Gerard M. Deenihan, *From Equity to Adequacy: The Legal Battle for Increased State Funding of Poor School Districts in New York*, 30 Fordham Urb. L.J. 1341 (2003).

78. See *Rose*, 790 S.W.2d at 215-16.

III. THE STRUGGLE FOR ADEQUACY

Law reformers, parents, and advocates have pressed for equality in allocation of school resources both as part of the struggle for racial equality and as part of a related effort to ensure every child, regardless of socio-economic class or neighborhood of residence, an equal educational chance.⁷⁹ After the United States Supreme Court found no violation of the federal Equal Protection Clause by a Texas school finance system that produced substantial inter-district disparities in per-pupil expenditures,⁸⁰ such challenges proceeded in state courts under state constitutional equal protection clauses and state constitutional commitments to provide a "thorough," "efficient," or "adequate" education.⁸¹

Early state suits pursuing equal educational opportunity emphasized equity in terms of the disparity in the amount of funds spent on each student.⁸² For example, at the time of the 1983 litigation in Arkansas, per-pupil expenditures ranged from \$2,378 to \$873.⁸³ More recently, plaintiffs pointed to the disparities in per-pupil expenditures in New York, ranging from \$43,000 to \$7,107.⁸⁴ These suits challenged the reliance on local real estate taxes that contributed to striking disparities within a state.

Some of these suits pressed for equalization of education revenues, a remedy facing at least three profound difficulties. First, courts may be equipped to reject taxation schemes, but they are not well suited institutionally or politically to design and implement new ones. Second, the actual principle appropriate to guide school finance is not legally or normatively obvious. Should the expenditure on each child be exactly the same even if it costs more to educate a child with special needs, an impoverished background, or limited English proficiency than a child without these circumstances? Should the focus of equitable concerns land not on

79. By 2002, forty-three suits challenging state school finance regimes generated nineteen decisions striking down state schemes under the relevant state constitution. Liz Kramer, Student Author, *Achieving Equitable Education through the Courts: A Comparative Analysis of Three States*, 31 J.L. & Educ. 1, 6 (2002); see Stewart G. Pollock, J., N.J. S. Ct., Keynote Address, *School Finance in the Courts* (N.Y.U. Sch. L., Oct. 30, 1998), in 1998 Annual Survey Am. L. 133, 134 (summarizing developments). For a helpful overview of recent suits, see Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in *Law and School Reform: Six Strategies for Promoting Educational Equity* 88, 102-19 (Jay B. Heubert ed., Yale U. Press 1999).

80. See *Rodriguez*, 411 U.S. at 54-55.

81. See generally Patricia F. First & Barbara M. De Luca, *The Meaning of Educational Adequacy: The Confusion of DeRolph*, 32 J.L. & Educ. 185, 191-96 (2003) (discussing Ohio litigation); Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigation in Kentucky, 1984-1995*, 26 L. & Soc. Inquiry 631 (2001); James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. Rev. 529, 530, 536-46 (1999) (discussing Connecticut litigation); William E. Thro, *Judicial Analysis during the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. Rev. 597, 601-04 (1994).

82. See Anna Williams Shavers, *Rethinking the Equity vs. Adequacy Debate: Implications for Rural School Finance Reform Litigation*, 82 Neb. L. Rev. 133, 140-45 (2003).

83. *DuPree v. Alma Sch. Dist.*, 651 S.W.2d 90, 92 (Ark. 1983).

84. Jennifer M. Palmer, Student Author, *Education Funding: Equality Versus Quality—Must New York's Children Choose?*, 58 Alb. L. Rev. 917, 946 (1995). The New York Court of Appeals indicated that gross and glaring inadequacies—rather than disparities—could give rise to a violation of the state constitution's education clause. *Reform Educ. Financing Inequities Today v. Cuomo*, 655 N.E.2d 647, 648 (N.Y. 1995).

individual students but instead on taxpayers, such that taxpayers willing to undertake a given level of effort should face lower expenditures in their schools than others who tax themselves at the same or lower rate simply as a reflection of variations in local property values? Should equity in school finance demand a uniform per-pupil expenditure or simply a minimal floor beyond which localities may choose to spend more? Third, statewide school finance reform faces a considerable obstacle in the traditional commitment to local control in education. That traditional commitment reflects conceptions of the proper location of power and also intense political desires, especially manifested by many middle-class and wealthy parents, to be able to choose their communities, their schools, and their level of investment in educating their own children. Unhappy parents with resources can move out of state, opt for private schooling, or undermine the legitimacy of a judicially-sponsored remedy, especially one that depends on a cooperative legislature. Legislative efforts to redress inequities have been slow, complex, and in many instances inadequate as assessed both by reviewing courts and academic measures of success.⁸⁵

Given these difficulties, it is not surprising that until 1989 most state courts rejected challenges to school finance schemes.⁸⁶ Some legislative reform triggered by suits—successful or unsuccessful—did emerge. As a result, some states created formulas to combine local district funds with funds from the general state tax revenues allocated in a flat grant. Others devised policies to generate either the same per-pupil expenditures or expenditures up to a minimum level for any district unable to raise that amount of money even when that district adopts a specified and hefty local tax rate. Economic studies of court-mandated reforms found that in all but one state, California, successful litigation prompted greater overall expenditures for schooling and the reduction of inter-district disparities.⁸⁷ Nonetheless, the suits based on equity theories continue to face serious theoretical, practical, and political difficulties.

Starting in 1989, school finance litigation added to equity claims or shifted entirely to a focus on the adequacy of the educational program. This change was prompted in part by disappointment with the prior equity suits and in part by emerging national studies indicating overall underinvestment in education that would not be remedied simply by equalization efforts.⁸⁸ Perhaps more importantly, the shift to equity reflected the desire of lawyers and judges to tether

85. See McUsic, *supra* n. 79, at 90. The Texas Supreme Court has repeatedly rejected versions of legislative reform as falling short of the state constitutional requirements. See Kramer, *supra* n. 79. Debate over the method for financing schools in Texas continues in the legislature. See Phil Magers, *Analysis: Texas Grapples with Schools*, United Press Intl. (Mar. 11, 2004) (available in LEXIS, News & Bus. library, News file).

86. Kramer, *supra* n. 79, at 7 (noting that nine of sixteen state courts upheld finance schemes before 1989).

87. See *id.* (citing Sheila E. Murray et al., *Education-Finance Reform and the Distribution of Education Resources*, 88 Am. Econ. Rev. 789, 801 (1988)).

88. See generally Natl. Commn. on Excellence in Educ., *A Nation at Risk: The Imperative for Educational Reform* (1983) (available at <<http://www.ed.gov/pubs/NatAtRisk/index.html>>); Richard Rothstein, *What Does Education Cost?*, 185 Am. Sch. Bd. J. 30, 30-33 (Sept. 1998) (explaining the turn to adequacy rather than equity theories because “an equal amount of too little is not enough”).

reforms to educational expertise. Improving schools requires knowledge that lawyers and judges do not have, and dispersing money is only a small part of the effort. Educational expertise began to appear in visible form through the emergence of state educational standards, usually accompanied by statewide performance tests. These standards offered at least an initial set of reference points about the actual effects of the education provided to students across a state—effects that could be used not only to measure the past but to prod changes in the future.⁸⁹ The standards emerged from efforts to promote accountability of teachers, as well as students, and to treat tests as diagnostic tools to identify areas for improving instruction.⁹⁰ In addition, several distinctive school reform initiatives addressing instruction, governance, and parental involvement gained national attention during the 1980s.⁹¹ When the Kentucky Supreme Court responded to a challenge to the school finance system by finding that the entire state school system failed to offer adequate education to its students, the task of devising an acceptable system was left to the state legislature. The legislature in turn not only raised per-pupil spending by raising taxes, but also devised performance-based school reforms to reshape the curriculum, governance, and accountability systems. The Kentucky experience exemplified an adequacy theory in its emphasis on student-level results in performance, whole school system reform, combination of changes in finance with changes in instruction and accountability, and cooperation between the judiciary and the legislature in producing compliance with the state constitution's commitment to provide students with an education.⁹²

Rather than concentrating on per-pupil expenditures, educational inputs, and reducing disparities between districts, suits have shifted to adequacy arguments in order to pursue institutional and programmatic changes intended to improve the academic performance of disadvantaged students. The adequacy theory, with some variations, has influenced court decisions in not only Kentucky, but also Alabama, Connecticut, Massachusetts, New Hampshire, New Jersey, New

89. See Avidan Y. Cover, Student Author, *Is "Adequacy" a More "Political Question" than "Equality?"*: *The Effect of Standards-Based Education on Judicial Standards for Education Finance*, 11 Cornell J.L. & Pub. Policy 403, 404-06, 427-39 (2002).

90. See Diane Massell, *State Strategies for Building Capacity in Education: Progress and Continuing Challenges* (CPRE Research Rpt. Ser. No. RR-41 1998) (available at <<http://www.cpre.org/Publications/rr41.pdf>>); see generally *High Stakes: Testing for Tracking, Promotion, and Graduation* (Jay P. Heubert & Robert M. Hauser eds., Natl. Acad. Press 1999) (assessing high-stakes tests used to determine who should progress to the next grade or graduate).

91. See generally e.g. *Effective Programs for Students at Risk* (Robert E. Slavin et al. eds., Allyn & Bacon 1989) (describing Success for All); Henry M. Levin, *Accelerated Schools for At-Risk Students* (CPRE Research Rpt. Ser. No. RR-010 1988); Theodore R.Sizer, *Horace's School: Redesigning the American High School* (Houghton Mifflin 1992); James P. Comer, *Educating Poor Minority Children*, 259 Sci. Am. 42 (Nov. 1988). For efforts to assess or consider assessment of such programs, see Thomas D. Cook, *Resistance to Experiments: Why Have Educational Evaluators Chosen Not to Do Randomized Experiments*, 589 Annals of Am. Acad. Pol. & Soc. Sci. 114 (2003); Jennifer A. King, *Meeting the Educational Needs of At-Risk Students: A Cost Analysis of Three Models*, 16 Educ. Eval. & Policy Analysis 1 (1994).

92. See *Rose*, 790 S.W.2d at 215; *Paris*, *supra* n. 81, at 632-34.

York, Washington, and West Virginia.⁹³ By emphasizing the educational needs of children and calling for a remedy that involves the legislature in devising a solution, these decisions produced new financial investment in schools as part of the larger commitment to each child.⁹⁴ By connecting explicit consideration of school finance and resources to educational standards and actual student performance, parents and advocates have initiated a broad struggle for educational adequacy in courts and legislatures. That struggle integrates social, economic, and political dimensions of education after decades in which law and politics forced these dimensions to be separated or truncated. The jury is out regarding the effectiveness of the adequacy approach; the state legislative remedies in many instances look less ambitious than the judicial demands.⁹⁵ Nonetheless, after all these years, the struggle for racial equality has been reunited with campaigns for higher quality schools, economic investment in disadvantaged communities, and a world of genuine opportunity for all children.

IV. THE PROMISE OF REASSEMBLY

History has a way of making ideas more complicated than they may seem in the abstract. For people use, fear, and resist ideas; ideas become banners attached to groups and institutions. Sometimes, hopes get trampled in the process. I have suggested that the political dynamics of the 1940s and 1950s pushed for disaggregating the vision of an equal and free people into separate civil, political, economic, and social dimensions. School reforms demanded by courts fell far short of the vision of equal opportunity for every child in America regardless of race, class, or geographic location. Recent efforts under state constitutions have

93. See Robert M. Jensen, *Advancing Education through Education Clauses of State Constitutions*, 1997 BYU Educ. & L.J. 1, 9-26. Maryland settled a similar case. See Timothy Ayers, Student Author, *Adequacy in Baltimore City Schools: Why the Consent Decree in Bradford v. Maryland Is Right*, 5 Geo. J. on Fighting Pov. 77, 78 (1997). A Vermont challenge that emphasized finance generated features in line with the adequacy theory. See Michael A. Rebell & Jeffrey Metzler, *Rapid Response, Radical Reform: The Story of School Finance Litigation in Vermont*, 31 J.L. & Educ. 167, 171-79 (2002). An unsuccessful suit in Oklahoma nonetheless contributed to the passage of a school finance reform consonant with the adequacy theory. See Mark S. Grossman, *Oklahoma School Finance Litigation: Shifting from Equity to Adequacy*, 28 U. Mich. J.L. Reform 521, 527-33 (1995). Litigation in Texas led the state supreme court to repeatedly strike down the school finance structure without developing a comprehensive or stable plan for school reform. See Margaret Rose Westbrook, Student Author, *School Finance Litigation Comes to North Carolina*, 73 N.C. L. Rev. 2123, 2129, 2133, 2182-83 (1995). The court first struck down the state finance scheme in *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (Tex. 1989). Subsequent decisions addressing revised legislation include: *Meno v. Edgewood Independent School District*, 917 S.W.2d 717 (Tex. 1995); *Carrollton-Farmers Branch Independent School District v. Edgewood Independent School District*, 826 S.W.2d 489 (Tex. 1992); and *Edgewood Independent School District v. Kirby*, 804 S.W.2d 491 (Tex. 1991). Similar litigation in North Carolina produced a demand for adequacy but raised new questions about efficacy and cost. See Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 Cornell J.L. & Pub. Policy 633, 658 (2002). On Washington and West Virginia, see generally William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 Santa Clara L. Rev. 1185, 1245-52 (2003).

94. Nickerson & Deenihan, *supra* n. 77, 1350-55.

95. See generally George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. Rev. 543 (1994); Westbrook, *supra* n. 93, at 2184-85.

allowed advocates and parents to reintegrate these strands into that big vision. Actual results remain to be seen.

Two temptations arise on this fiftieth anniversary of the Supreme Court's declaration that separate schools are inherently unequal: to celebrate the symbolic victory and obscure the shockingly vast distance that remains from the vision of equal opportunity for all children—or to despair at the missed chances and obstacles. I urge a different and better path inspired by the work, and indeed, the words, of Frank Michelman, who once wrote: "Though it might turn out that there is no way, in this vale of tears, to make things on the whole any better, you would be committed to at least searching for some corrective."⁹⁶

96. Michelman, *supra* n. 1, at 33-34.